RETHINKING KANSAS ADMINISTRATIVE PROCEDURE

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Kansas has failed to develop a satisfactory body of administrative procedural law. Existing statutes are often vague or inconsistent concerning the type of notice or hearing that is required before an agency can deprive a person of an entitlement such as a license or a state job. The type of judicial review available is often less challenging to the propriety of an agency's actions than the legislature mandated. Moreover, the judiciary at times insufficiently protects the integrity of agency proceedings by allowing the reviewing court to take new evidence. This Article will explain these inadequacies and offer recommendations for legislative and judicial reform.

Part I of the Article suggests that Kansas should adopt an administrative procedure act. As a result of recent decisions by the United States Supreme Court that restrict use of the due process clause of the fourteenth amendment to invalidate actions by state agencies, a party may be entitled only to those procedural protections that a state legislature grants by statute or that a state court confers as a matter of state constitutional due process. In Kansas, neither source gives sufficient protection to entitlements. The statutory grants of procedural protection are so inconsistent and ambiguously worded that the protections available may be inaccurately or unevenly applied. At the moment, there is no relief from these problems as a matter of state constitutional due process because the state supreme court appears to be following the recent restrictive federal decisions. Because of its uniform nature, an administrative procedure act should eliminate the present problems of ambiguity and inconsistency. Moreover, the legislature is particularly well suited to determine what degree of protection is appropriate. However, if the legislature fails to act, the Kansas Supreme Court should attempt to effect a solution. As a matter of state due process, the court could require a minimum level of procedural protection when an agency is unable to justify a lesser degree of protection.

Part II of this Article will recommend two changes in judicial review of agency decisions. First, the courts should abandon the undesirable practice of allowing the introduction of some evidence, not presented to an agency, at the time of appeal. By failing to remand the evidence to an agency for its consideration, the judiciary loses the advantage of having the expertise of the agency applied to the evidence. Indeed, with the new evidence the matter might be resolved by the agency without the need for judicial appeal. Second, the courts should follow their own tests for distinguishing agency functions that are administrative from those that are quasi-judicial, a distinction that is critical for the application of the separation of powers doctrine. Unless these tests are correctly applied, the courts will continue to fail to

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undertake the type of review ordered by the legislature for some quasi-judicial functions.

To demonstrate the need for these reforms, the Article first considers the relationship between the due process clause and state administrative procedure. It then examines the nature of Kansas procedural protections and judicial review in light of that relationship.

I. NOTICE AND HEARING

A. Constitutional Developments

Recent constitutional developments have placed a renewed emphasis on state legislative decisions concerning agency notice and hearing procedures. Motivated by a desire to give agencies greater flexibility and by considerations of federalism, the United States Supreme Court has curtailed the application of the due process clause to agency actions that deprive a person of an entitlement. These decisions, which affect both the property and liberty interests protected by the due process clause, may allow state legislatures and state courts to determine exclusively the kind of procedural protection that will be required in such circumstances.

1. Property

The fourteenth amendment stipulates that "[no state shall] deprive any person of life, liberty, or property, without due process of law. . . ." While it has seldom been disputed that real and personal property constituted "property" for purposes of the due process clause, government entitlements such as welfare benefits, licenses, or employment relationships were once regarded as "privileges" granted by the state and revocable at will. This "rights/privileges" distinction was abandoned in Goldberg v. Kelly and replaced in Board of Regents v. Roth with a new concept of "property." Roth stated that when the state created in its citizens the same sort of expectations for an entitlement concerning continuing ownership that it created for real estate, chattels, or money, the due process clause would restrain the deprivation of the entitlement:

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives . . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Despite the increased protection accorded entitlements in Roth, the Supreme Court has recently limited the use of the due process clause to protect entitlements

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1 See notes 104 & 105 and accompanying text infra.
2 U.S. Const. amend. XIV, § 1.
5 408 U.S. 564 (1972).
6 Id. at 577.
in three ways. First, when the Court uses its balancing test to determine whether an individual deserves more procedural protection than has been granted by a state, it seems inclined to favor enforcing state statutes as they are written. Second, the Court has ruled that only certain types of entitlements even require consideration of whether an individual should be accorded more due process than has been granted by statute. Last, the Court apparently will allow a state to create entitlements without providing any procedures for their vindication.

a. Balancing Criteria

If an entitlement is judged to constitute property, a court must determine whether, as a constitutional matter, a state must give more procedural protections than it originally provided. According to Matheus v. Eldridge, this determination requires a court to identify the nature of the “private interest that [would] be affected” and “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” These interests of the individual are then weighed against the “government's interest [in the existing procedures], including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Critics have claimed that the Matheus balancing test and the Supreme Court’s use of that test have failed to give sufficient weight to the individual's interest in greater procedural protection, and that the state’s interest invariably has been found superior as a result. In fact, since Matheus the Supreme Court has only once concluded that deprivation procedural safeguards, including a right to personal participation, were constitutionally required. By comparison, the lower federal courts have been more sympathetic to private interests, and additional protections have been ordered.

The states have a reasonable degree of autonomy as a result of these developments. An individual is entitled to more procedural protection than the state wishes to grant only if the person's interest in greater formality exceeds the state's interest

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7 Judge Friendly has listed the range of protections as: (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons why the proposed action should not be taken, (4) the right to present evidence, including the right to call witnesses, (5) the right to know opposing evidence, (6) the right to cross-examine adverse witnesses, (7) a decision based exclusively on the evidence presented, (8) the right to counsel, (9) the requirement that the tribunal prepare a record of the evidence presented, and (10) the requirement that the tribunal prepare written findings of fact and reasons for its decisions. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1279-92 (1975).


9 Id. at 335.

10 See Lawrence, Fairly Due Process: Minimum Protection Recognized but not Applied in Mathews v. Eldridge, 1977 Utah L. Rev. 627 (criticizing application of test); Saphire, Specifying Due Process Values: Toward A More Responsive Approach To Procedural Protection, 127 U. Pa. L. Rev. 111, 154-56 (1978) (criticizing concept of test); Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Cle. L. Rev. 28 (1976) (criticizing both concept and application of test). The concept of the test has been faulted on the grounds that it is too utilitarian. It fails to consider other values that would be served by additional procedural protections, such as dignity, equality, and tradition. See, Saphire, supra, at 156-66; Mashaw, supra, at 46-57.


in informality. Moreover, the Supreme Court, if not the lower federal courts, may be predisposed to accept the state's view of the matter. In any case, the Supreme Court has taken two other actions that show deference to a state's decision concerning how much procedural protection to grant.

b. Entitlements With Limited Protections

One of these developments can be traced to Arnett v. Kennedy. In that case, a statute provided that a federal employee could be fired "only for such cause as will promote the efficiency of the [civil] service." Five members of the Court held that no procedural protections need be added to those already granted by that statute. The three who supported the opinion of the Court found that because the statute granting the employee's entitlement not to be fired without cause was "inextricably intertwined" with the procedures to be used to determine whether the entitlement could be revoked, the employee had a guarantee against removal for cause only "as enforced by the procedures which Congress has designated for the determination." Thus, according to the plurality, when the same statutory section that creates an entitlement also spells out the procedural protections to be used to safeguard it, a person cannot have "an expectancy of that substantive right without the procedural limitations ... attached to it."17

Although the matter is far from clear, a majority of the Court apparently now endorses the Arnett concept, at least for some types of entitlements. If Arnett is generally followed instead of Roth, the states, in effect, will become the judges of what process should be provided. By merely intertwining the grant of an entitlement with the provision for procedures to determine how the entitlement can be revoked, the state will preclude any consideration of whether additional protections are warranted as a matter of due process.

14 Id. at 140.
15 Id. at 140, 159, 171 (Powell, J., concurring in part and concurring in the result in part).
16 Id. at 152-54. The remainder of the Court, although split as to the result, did not endorse the approach of the plurality in defining property. Justice Powell, joined by Justice Blackmun, concurred in the result for the reason that although an entitlement had been created under the Roth criteria, the government's interest in expedited proceedings outweighed the individual's interest in more process. Id. at 166-67, 171 (Powell, J., concurring in part and concurring in the result in part). The others followed Roth and struck the balance between the individual and the government's interests in favor of the individual, although they disagreed concerning how many additional protections would need to be provided. See id. at 184-85, 196-203 (White, J., concurring in part and dissenting in part); id. at 211, 226-27 (Marshall, J., dissenting).
17 For a description of this balancing process, see notes 10-11 and accompanying text supra.
18 416 U.S. at 152.
20 This ambivalence may mean nothing more than that the Arnett analysis will not be applied when the substantive right and the procedural safeguards are clearly bifurcated in a legislative enactment, see Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269, 278 n.29 (1975), or it may mean that at least some members of the Court only intend to apply the Arnett analysis to some kinds of entitlements (such as governmental employment) but not to others (such as welfare). See Saphire, supra note 10, at 138-39. A possible rationale for this distinction is suggested at note 104 infra.
c. Entitlements Without Protections

The second development is found in Bishop v. Wood,\(^9\) in which the Court held that a state statute did not create an entitlement giving a policeman the right to be fired only for cause. The North Carolina statute in question provided that a policeman could not be discharged unless the employee was negligent, inefficient, or unfit, or unless the employee's work failed to meet the standard of his or her classification. Nevertheless, the Court adopted the strained interpretation of the federal district court that the policeman's employer had absolute discretion, subject to fulfilling certain procedures, to fire the policeman.\(^{20}\) The statute had never been interpreted by the North Carolina courts and the court of appeals split four to four on the issue whether the federal trial judge, because of his experience as a North Carolina lawyer, should be given deference regarding his interpretation.\(^{21}\)

Bishop represents a shift in approach. Previously, the Court had taken an expansive view of whether an entitlement constituted property. In Perry v. Sinderman,\(^{22}\) decided the same day as Roth, the Court allowed an individual to try to prove that his employment contract as a teacher impliedly granted him tenure as a condition of employment on the grounds that "'property' interests . . . are not limited by a few rigid, technical forms . . . [but denote] a broad range of interests that are secured by 'existing rules or understandings.'"\(^{23}\) By comparison, although Bishop admitted the North Carolina statute "may fairly be read as conferring [an entitlement]," it rigidly refused to give it such a broad interpretation.\(^{24}\)

It is possible that the Court in Bishop has returned to the previously discredited "rights/privileges" distinction. In Roth, the Court used the same test to determine whether entitlements were property that it applied to cash, chattels, or real estate. For all of the categories the Court asked whether the state had created in a person a reasonable expectation that the person would have continuing ownership. "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."\(^{25}\) By comparison, Bishop holds that "the sufficiency of the claim of entitlement must be decided by reference to state law."\(^{26}\) Hence, as long as a state provides that there is no right to continued receipt of an entitlement, it will not be "property" for purposes of the due process clause. Since the Court will ignore the reasonable expectation of a party concerning the entitlement, a state may provide for its withdrawal at any time. The entitlement, in effect, becomes a privilege and not a right.\(^{27}\)

After Arnett and Bishop, a state may well control its own destiny. By intertwining procedures and substance, it can decide what procedural protections will be used to revoke a property entitlement. Moreover, it apparently can create for itself the privilege of revoking entitlements at will without offering any procedural protections. Theoretically, a party might avoid either of these results by arguing that the state's action constituted a deprivation of a liberty interest that entitled

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\(^{9}\) 426 U.S. 341 (1976).
\(^{10}\) Id. at 344-46.
\(^{2}\) Id.
\(^{23}\) 408 U.S. 593 (1972).
\(^{24}\) Id. at 601.
\(^{25}\) 426 U.S. at 345.
\(^{26}\) 408 U.S. at 577 (emphasis added).
\(^{27}\) 426 U.S. at 344.
\(^{27}\) See Monaghan, supra note 3, at 440-41.
the party to due process. The Supreme Court, however, has also recently limited use of the due process clause for this purpose.

2. Liberty

In the past, the Court has looked to three sources to define the contours of the "liberty" due process interest. Some sections of the Bill of Rights have been made applicable to the states when the rights were "implicit in the concept of ordered liberty" or were "basic to a free society." Another source has been positive law (state or federal) that created an expectation in a citizen of a liberty interest. Finally, the Court has found "liberty" interests that are not specifically defined by either the Bill of Rights or by positive law, such as the right to "privacy" and the right to be free from punishment or bodily restraint without a prior determination of guilt. In its use of any of these sources of liberty, the Court previously was guided by the sentiment that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

Recently the Court has adopted a much more restrictive approach. Paul v. Davis indicates the direction of these changes. Respondent Davis challenged the distribution by police officials, without a prior hearing, of a flyer identifying him as an "active" shoplifter. Davis noted that he had once been arrested for shoplifting, but had never been convicted. The court of appeals sustained Davis' complaint on the basis of Wisconsin v. Constantineau, in which a circular that described several citizens as "drunkards" was distributed to announce that sale of alcohol was prohibited by state law to the persons on the list. Although Constantineau had held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," the Supreme Court, with three of seven Justices dissenting, reinstated the district court's decision to dismiss Davis' complaint. Ignoring their actual holding in Constantineau, the Paul v. Davis Court read the entire case to...

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31 See, e.g., Whalen v. Roe, 429 U.S. 589 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The ultimate scope of the privacy right is still undefined. See 242 U.S. at 599 n.24. The source of this right has been variously identified as express notions of personal liberty protected by the fourteenth amendment, see, e.g., 410 U.S. at 153; as an inquiry concerning the "penumbras" and "emanations" of the Bill of Rights, see, e.g., 381 U.S. at 484 (plurality opinion); and as an explication of the "language and history of the Ninth Amendment," see, e.g., id. at 487 (Goldberg, J., concurring).
34 Id. at 695-96.
36 Id. at 435.
37 Id. at 437, quoted with approval in 408 U.S. at 573 (1972). See also Goss v. Lopez, 419 U.S. 565, 574-75 (1975).
38 424 U.S. at 714.
39 Constantineau states explicitly that "the only issue present here is whether . . . 'posting' . . . is . . . such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be
involve the loss of a liberty interest created by the state to purchase liquor in common with other citizens. By comparison, the Court noted that because the state sued by Davis had no law creating protection for Davis' reputation, he had not asserted a liberty interest cognizable under the Constitution. 

The Constantineau opinion drew its definition of reputation as a liberty interest from a source other than positive law or the Bill of Rights. In the future, however, Paul v. Davis suggests that, with limited exceptions, the Court will not go beyond the confines of positive law or the Bill of Rights to find such liberty interests. Thus, since for purposes of expanding the definition of liberty the Court has previously used those other sources, the definition of liberty is unlikely to be expanded in the future. Instead, as with the definition of property, the Court may hold that its primary source will be state law.

Even in instances in which the Court has found a liberty interest, it has limited the applicability of the due process clause by narrowing the interest when a broader interest could also have been recognized. Thus, although there is a liberty interest to be free from punishment without a prior adjudication of guilt, the Court has greatly restricted the determination of what disabilities will constitute punishment. Similarly, although an individual can still assert a liberty interest to prevent defamation by the state that will adversely affect the prospects of future employment, the due process hearing may only serve to establish whether the statements by the state were false. By this holding, the individual would be prevented from arguing the substantive due process claim that even if the facts at issue were true, the state's action was not warranted. The Court also implied that an individual could not even argue that the failure of a state to follow its own mandated procedures was a due process violation.

These developments reinforce the trend suggested by the cases that consider the definition of property. Taken together, the Court’s recent decisions affecting liberty and property interests make it unlikely that an individual can invalidate agency decisions on procedural grounds. The Court’s efforts could effectively be overruled.

heard." 400 U.S. at 436. Nevertheless, the Court has characterized this language as ambiguous and supportive of the court of appeals only "[i]f read that way." Paul v. Davis, 424 U.S. at 708.

41 424 U.S. at 708.
42 Id. at 711-12.
43 Id. at 711 (state law); id. at 710 n.5 (Bill of Rights). The opinion did indicate that the privacy right might also continue to be recognized, id. at 712-13, but according to some Justices that right may not be a "liberty" interest. See note 31 supra. Elsewhere, the Court has recognized a narrow liberty interest, not explicitly recognized in the Bill of Rights, to be free from punishment without a prior hearing to determine guilt. See text at note 45 infra.

45 See notes 1-27 and accompanying text supra.
46 441 U.S. at 535-40; id. at 586-88 (Stevens, J., dissenting). See also Greenholz v. Nebraska Penal Inmates, 442 U.S. 1, 7-8 (1979).
47 Codd v. Velger, 429 U.S. 624, 626-27 (1977). Communications that are not made public, however, by definition cannot have this effect and raise no question of a violated liberty interest. Bishop v. Wood, 426 U.S. at 348-49.
48 429 U.S. at 627-28.
49 Id. at 634 (Stevens, J., dissenting). See also Board of Curators v. Horowitz, 435 U.S. 78, 91-92 (1978).

The use of the "liberty" interest of the due process clause to review the substantive correctness of state decisions is quite controversial. See Dixon, The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon, 1976 B.Y.U. L. Rev. 43.

50 See 429 U.S. at 634 (Stevens, J., dissenting). The plurality opinion in Horowitz seemed to more clearly adopt this position. 435 U.S. at 92 n.8.
if a state in the interpretation of its own due process clause would refuse to follow these trends. The Kansas Supreme Court, however, does not appear to be so inclined. When it has recognized the existence of these developments, they have been followed. At other times, the court has not followed the new cases, but there is no indication that the court will adopt a position inconsistent with the Supreme Court.\(^{50}\)

**B. Kansas Developments**

1. **Property**

The Kansas Supreme Court apparently has not been called upon to apply the new property entitlement cases. Unlike *Bishop* and *Arnett*, recent cases have not involved claims that an agency could revoke an entitlement at will or that an agency was limited to the procedures established by statute. Recent relevant Kansas decisions include *Wertz v. Southern Cloud Unified School District*,\(^{51}\) in which a school teacher under a contract for the school year challenged his mid-year dismissal. The court recognized as a property interest the clear, unencumbered right the teacher had in continued employment for the duration of his contract. In *Leek v. Theis*,\(^{52}\) the court considered whether the Kansas Senate was required to grant a hearing before rejecting the governor’s nominee to a state board. The court concluded that since the nomination was subject to senate confirmation, there could be no entitlement to continued employment until after that event.\(^{53}\) Under those circumstances, even the *Roth* test for property was not met. Since the nominee’s employment was conditional on legislative action, he could have no reasonable expectation that he was given a property interest in his job.

Although it has not yet had an opportunity to apply the new property cases, the Kansas Supreme Court recently took the occasion of considering a related issue to describe the present rules concerning due process. The court’s description, however, failed to take account of the recent changes. *Suburban Medical Center v. Olathe Community Hospital*,\(^{54}\) raised the question whether an agency can consider evidence that was not placed in the administrative record, but that was presented informally without the presence of the opposing party. In prohibiting such *ex parte* contacts, the court wrote that a full hearing would be necessary as a matter of due process under the United States Constitution whenever an agency acted in a “quasi-judicial” manner.\(^{55}\) The Kansas court, however, stated the matter too broadly. A right to due process exists only if a person is deprived of *property* or *liberty* by the “quasi-judicial” actions of the agency.\(^{56}\) Under recent Supreme Court interpreta-

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50 See notes 51-60 and accompanying text infra.
52 217 Kan. 784, 810, 539 P.2d 304, 325 (1975). Since *Leek* involved the removal of an agency official by legislative action, the court should have considered the possibility that the due process clause had no application at all. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908). See generally B. SCHWARTZ, ADMINISTRATIVE LAW § 70 (1976).
53 217 Kan. at 812, 539 P.2d at 326.
tions of what constitutes property and liberty, these deprivations would not happen every time an agency took action in a judicial manner.\textsuperscript{57}

In the past when a liberty or property interest has been found, the Kansas courts invariably have sided with an individual's claim that there should have been more procedural protections than an agency provided. In some cases, these decisions reflect a determination that an individual's interest in more protection is superior to the agency's interest in a more informal proceeding. In \textit{Wertz}, for example, the teacher was dismissed after a hearing from which he had been excluded.\textsuperscript{58} When the Kansas Supreme Court analyzed the district's interest in proceeding in such a summary fashion, it found that the allegations against the teacher were not of such a nature that there was any danger of "a sudden serious disruption of the educational processes of the school."\textsuperscript{59} Barring that threat, the court concluded, the teacher's interest in an accurate determination of the merits of the charges outweighed any interests of the district in proceeding as it did.\textsuperscript{60} In other cases, however, the state's interest has evidently received no consideration.\textsuperscript{61} Instead, the court merely found that certain procedures omitted from a statute were important or fundamental to a fair process. This truncated method of proceeding occurred in \textit{Adams v. Marshall},\textsuperscript{62} in which a policeman complained that a hearing concerning an attempt to suspend him should have included the right to examine and cross-examine witnesses. Without analyzing the Civil Service Board's reasons for proceeding without these protections, the court held that the "right to the cross-examination of witnesses in quasi-judicial . . . proceedings is one of fundamental importance and is generally, if not universally, recognized as an important requirement of due process."\textsuperscript{63} It may be that the court found no viable state interest, but if this balance was struck, the decision failed to indicate it.

If the Kansas courts follow the implications of recent constitutional developments, they will no longer be able to say that the due process clause requires a full set of procedural protections for every quasi-judicial agency action in Kansas. Henceforth, statutes that provide for more informal hearings may be constitutionally valid. Moreover, as the courts try more explicitly to implement the balancing criteria, agencies may have the same success that their federal counterparts have had in arguing that their interests in proceeding informally outweigh an individual's interest in more formal protections.\textsuperscript{64}

\section{Liberty}

The Kansas courts have had somewhat more experience in applying the recent liberty due process decisions than in applying developments in the property area. In cases concerning punishment or incarceration the results are consistent with the most recent United States Supreme Court cases, but this consistency is often obscured by a failure to cite and explain the relevant precedent.\textsuperscript{65} By contrast, other

\textsuperscript{57} See notes 7-49 and accompanying text supra.
\textsuperscript{58} 218 Kan. at 30-31, 542 P.2d at 344.
\textsuperscript{59} \textit{Id.} at 32, 542 P.2d at 345.
\textsuperscript{60} \textit{Id.}, 542 P.2d at 346.
\textsuperscript{61} See, e.g., 212 Kan. at 601, 512 P.2d at 371; 205 Kan. at 785-86, 473 P.2d at 76.
\textsuperscript{63} \textit{Id.} at 599-600, 512 P.2d at 370.
\textsuperscript{64} See notes 10-11 and accompanying text supra.
developments have not yet been followed. In *Sinclair v. Schroeder*, a magistrate who was removed from office when he failed to pass the qualifying examination alleged that the removal without a prior hearing violated his liberty interest in "his good name, honor, or integrity." Although the due process clause now has been held not to include such a liberty interest, the Kansas Supreme Court did not question that a liberty interest in reputation could exist. The court, instead, found as a factual matter that the actions of the state did not constitute stigmatization of the individual.

Neither the property nor liberty rulings of the Kansas Supreme Court reveal any intention to create a definition of property or liberty under the Kansas Constitution independent of that created by the United States Supreme Court. Indeed, whenever the Kansas Supreme Court has been cognizant of recent changes, it has adopted them. Since Kansas may soon follow the Supreme Court in restricting the use of the due process clause, the Kansas Legislature will have the dominant role in determining what procedural protections will be given before an entitlement is withdrawn. However, the existing legislative pronouncements on due process are, unfortunately, not satisfactory. At a time when its will may be controlling, the legislature has provided for procedures that are vague and inconsistent from agency to agency.

C. The Need for Reform

The procedural protections available to an individual under Kansas law are spelled out in hundreds of statutory sections that make up the legislative enactments which created the various agencies. In addition, some agencies have supplemented those provisions by use of their rulemaking authority. A study of seventeen licensing agencies reveals that this network of provisions is in a sorry state. Many of the statutes are imprecise concerning the exact nature of the protections available. Moreover, probably because of their piecemeal creation, the protections they afford vary greatly from agency to agency. The functions performed by those agencies, however, do not appear to justify the differences.

App. 2d 596, 597-98, 585 P.2d 620, 623 (1978). In *Foster*, for example, without citing any case authority, the Kansas Supreme Court decided that the action of prison officials denying a prisoner privileges available to other prisoners who were also in protective custody "implicated no constitutional right" of the prisoner since he was deprived of "no . . . fundamental right" by the action. 222 Kan. at 510, 565 P.2d at 288. The court's decision was consistent with *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976), in which the United States Supreme Court held that a prisoner had no liberty interest in the conditions of his confinement since neither state law in that case, nor the Bill of Rights, provided such an interest. In another portion of the *Foster* opinion the Kansas court did cite *Meachum*, but for a related proposition. The *Meachum* Court explained its unwillingness to go outside state law or the Bill of Rights to create a liberty interest in this context as a policy of decreasing federal court interference with state prison administration. 222 Kan. at 509, 565 P.2d at 288 (quoting *Montanye v. Haymes*, 427 U.S. at 224, 228-29). *Foster* should have been supported by citation to *Montanye v. Haymes*, 427 U.S. 236, 241-43 (1976).

*225 Kan. 3, 586 P.2d 683 (1978).*

*Id.* at 8-9, 586 P.2d at 687-88.

*Id.* at 9, 586 P.2d at 688. The court relied on *Wertz and Leek*. Both opinions applied the broad definition given liberty by the Supreme Court in *Kosh*. 218 Kan. at 29, 542 P.2d at 343; 217 Kan. at 812, 539 P.2d at 326-27. In *Leek*, the court found as a matter of fact that no character defamation existed, 217 Kan. at 812, 539 P.2d at 327, but in *Wertz* it found that the "stigma which attaches to a mid-year dismissal of a non-tenured teacher for incompetence is sufficiently serious to call for a hearing." 218 Kan. at 29, 542 P.2d at 344.

*225 Kan. at 9, 586 P.2d at 688.*

*For a listing, see notes 85 & 89 infra.*
1. Vagueeness

Problems of vagueeness are of two types: Lack of specificity and inadequate enumeration of protections. In some of the licensing statutes, the legislature has provided that a hearing must be held, but it has not specified what protections must be given to a party during that hearing.\(^{71}\) In other statutory schemes, the legislature has attempted to indicate those protections, but has done so in an inadequate manner. Examples of the latter problem include the following:

(a) Evidence: Five statutes\(^{72}\) and one administrative rule\(^{73}\) specify that a party can present both documentary and testimonial evidence, but two other statutes more vaguely specify only that a party can present "evidence."\(^{74}\)

(b) Subpoenas: Two statutes\(^{75}\) and two administrative rules\(^{76}\) authorize an agency to issue subpoenas on behalf of a party, but six others are silent concerning whether subpoenas can be used for that purpose.\(^{77}\)

(c) Evidentiary rules: Three statutes\(^{78}\) and two administrative rules\(^{79}\) state that the rules of evidence need not be strictly applied, but the other licensing statutes are silent concerning the applicability of those rules.

(d) Transcript: One statute requires a transcript to be made of testimony taken during a proceeding,\(^{80}\) but other statutes are more vague, calling for arrangements such as a "record . . . of all proceedings,"\(^{81}\) a "transcript of the records,"\(^{82}\) or a "duly certified transcript of all pleadings upon which the case was tried,"\(^{83}\) that do not appear to require such a transcript. One statute requires a "transcript" if the proceedings are appealed,\(^{84}\) an eventuality that presumably would be unknown at the time the transcript would have to be taken.

2. Inconsistency

Another problem more troublesome than the vagueeness of some statutes is that agencies engaged in similar functions offer different degrees of protection. These arise in professional licensing agencies and public health related agencies. For ex-

\(^{71}\) Kan. Stat. Ann. § 65-430 (Supp. 1979) (hospital licensing); id. § 65-3508 (Supp. 1979) (adult care home licensing) [unless otherwise indicated, all sections hereinafter referred to are from Kansas Statutes Annotated].

\(^{72}\) Kan. Stat. Ann. § 65-430 (Supp. 1979) (hospital licensing); id. § 65-3508 (Supp. 1979) (adult care home licensing) [unless otherwise indicated, all sections hereinafter referred to are from Kansas Statutes Annotated].

\(^{73}\) Id. § 1-313 (1975) (accountant licensing); id. § 7-124b (Supp. 1979) (Rule 211(d)) (attorney disciplinary panel); id. § 36-509(a) (Supp. 1979) (food service and lodging licensing); id. § 65-1120(b) (Supp. 1979) (board of technical professionals).


\(^{75}\) Kan. Stat. Ann. § 41-321 (1973) (alcoholic beverage control board); id. § 65-2844(a) (Supp. 1979) (board of examiners in optometry) (opportunity to "produce testimony").

\(^{76}\) Id. § 1-313 (1975); id. § 65-1120(b) (Supp. 1979).


\(^{78}\) Kan. Stat. Ann. § 36-509(a) (Supp. 1979); id. § 65-1452 (1972) (board of dental examiners); id. § 65-1627(a) (Supp. 1979) (board of pharmacy); id. §§ 65-1821, -1829 (1972) (board of barber examiners); id. § 65-2844 (Supp. 1979); id. § 74-7027 (Supp. 1979) (board of technical professionals authorized to request district court to issue subpoenas).

\(^{79}\) Id. § 1-313 (1975); id. § 65-1627(a) (Supp. 1979) (board of pharmacy not bound by technical rules of procedure); id. § 65-2844 (Supp. 1979) (board of healing arts not bound by technical rules of procedure).


\(^{81}\) Kan. Stat. Ann. § 1-313 (1975). See also id. § 7-124b (Supp. 1979) (Rule 211(e)) (attorney disciplinary panel) ("all proceedings and testimony shall be recorded").


\(^{84}\) Id. § 65-2844 (Supp. 1979).
ample, eight of the agencies that engage in professional licensing\textsuperscript{85} differ significantly concerning the scope of a hearing to be provided:

(a) \textit{Oath}: Only five of the eight statutes require witnesses to testify under oath.\textsuperscript{86}

(b) \textit{Cross-examination}: Only five of the eight statutes provide for the right to cross-examine adverse witnesses.\textsuperscript{87}

(c) \textit{Discovery}: Only one of the eight statutes authorize a party to discover the evidence that an agency will present at a hearing.\textsuperscript{88}

An examination of nine of the agencies engaged in the protection of the public health\textsuperscript{89} reveals an even greater disparity:

(a) \textit{Hearing}: Only seven of the nine statutes require a hearing before a license is terminated.\textsuperscript{90} Two of the statutes that require a pre-termination hearing do not specify what hearing procedures are to be used.\textsuperscript{91}

(b) \textit{Right to Counsel}: Of the five statutes that specify hearing procedures, only one requires the right to counsel.\textsuperscript{92}

(c) \textit{Oath}: Of these same five statutes, only three require witnesses to testify under oath.\textsuperscript{93}

(d) \textit{Cross-examination}: Only two of the five statutes offer the right to cross-examine adverse witnesses.\textsuperscript{94}

Since each agency within the two classes described (professional licensing agencies and public health related agencies) seems to be engaged in a similar function, the differences in the types of protection provided cannot easily be justified. A closer examination of two agencies—the Board of Barber Examiners and the Board of Cosmetology—illustrates the lack of rationality in the present system. Shortly after the regulatory schemes for barbers and cosmetologists were created, the Kansas Supreme Court had occasion to observe that “[s]o far as the two fields are distinct, the services rendered are kindred personal services for improvement of the health, comfort, and appearance of men and women, and the two statutes are essentially \textit{in pari materia}.”\textsuperscript{95} But despite this “kindred” nature, the treatments of hearing

\textsuperscript{85} Id. § 1-313 (1975) (accountants); id. § 7-124b (Supp. 1979) (Rule 211) (attorneys); id. § 65-1449 (1972) (dentists and dental hygienists); id. § 65-1507 (Supp. 1979) (optometrists); id. § 65-1627f (Supp. 1979) (pharmacists); id. § 65-2844 (Supp. 1979) (physicians); id. § 74-7027 (Supp. 1979) (architects).
\textsuperscript{86} Id. § 1-313 (1975); id. § 7-124b (Supp. 1979); id. § 65-1120(b) (Supp. 1979); id. § 65-1452 (1972); id. § 74-7027 (Supp. 1979).
\textsuperscript{87} Id. § 1-313 (1975); id. § 7-124b (Supp. 1979) (Rule 211(d)); id. § 65-1120(b) (Supp. 1979); id. § 65-1507 (Supp. 1979); id. § 74-7026(b) (Supp. 1979).
\textsuperscript{88} Id. § 7-124b (Supp. 1979) (Rule 216(d)).
\textsuperscript{89} Id. §§ 8-201 to -290 (1975 & Supp. 1979) (driver licensing); id. §§ 36-501 to -516 (Supp. 1979) (food service and lodging licensing); id. § 41-203 (Supp. 1979) (alcoholic beverage control board); id. §§ 65-410 to -440 (Supp. 1979) (hospital licensing); id. § 65-501 (Supp. 1979) (maternity hospital and children home licensing); id. §§ 65-1701 to -1714 (Supp. 1979) (embalmer and funeral director licensing); id. § 65-1809 (1972) (board of barber examiners); id. § 65-1904(b) (Supp. 1979) (board of cosmetology); id. § 65-3506 (Supp. 1979) (adult care home licensing).
\textsuperscript{90} But see id. § 8-255(b) (1975) (driver entitled, however, to hearing within 30 days on request);
\textsuperscript{91} id. § 65-504 (Supp. 1979).
\textsuperscript{92} Id. § 65-430 (Supp. 1979); id. § 65-3508 (Supp. 1979).
\textsuperscript{93} Id. § 36-509(a) (Supp. 1979). Two agencies have provided the right of counsel by administrative rule, \textit{Kan. Admin. Reg.} arts. 63-1-8, -2-9 (1978); id. art. 69-9-2 (1978).
\textsuperscript{94} Id. § 36-509(a) (Supp. 1979); id. § 41-322 (Supp. 1979); id. § 65-1821 (1972).
\textsuperscript{95} Id. § 36-509(a) (Supp. 1979); \textit{Kan. Admin. Reg.} art. 13-2-8 (1978) (right to cross-examine provided by administrative rule).
\textsuperscript{96} State v. Cavender, 131 Kan. 577, 580, 292 P. 763, 764-65 (1930).
rights differ greatly. The barber statute provides that a hearing must be held before a license can be revoked, but the cosmetology statute is silent concerning the need for a hearing.\textsuperscript{96} The Cosmetology Board has provided for such a hearing by rule,\textsuperscript{97} but the Board has ordered a different set of procedural protections than provided by statute for the barbers. The cosmetology rule establishes a right to counsel and to present "evidence."\textsuperscript{98} The barber statute establishes a right to testimony under oath and subpoena authority for the agency.\textsuperscript{99} If barbers and cosmetologists perform essentially the same services, there can be no justification for the present state of affairs concerning these areas of regulation.

These skewed results indicate a need to reform the present system of administrative procedure. If the legislature wishes to eliminate problems of vagueness and inconsistency, adoption of an administrative procedure act would be a considerable step forward.

D. The Nature of Reform

1. Legislative Reform

Because of its uniform nature, adoption of an administrative procedure act offers the best method for eliminating present problems and for avoiding their future occurrence. Because the act would apply to all agencies, inadvertent inconsistencies caused by the piecemeal creation of the existing statutes would be eliminated. Agencies performing similar functions would be given the same hearing structure unless a reason exists for a different approach. Legislative drafting could focus on the more limited number of provisions to be contained in the procedure act, instead of on the hundreds of procedural provisions now in effect, with greater attention paid to the removal of ambiguous or confusing provisions. In addressing that task, the legislature could consult the federal procedure act,\textsuperscript{100} the state model procedure act,\textsuperscript{101} or other state acts,\textsuperscript{102} for guidance. If inconsistency or ambiguity is discovered after the procedural act is adopted, further reform efforts would be facilitated. At present, if one statute is amended, similar problems with another statute may remain. Under an administrative procedure act, by comparison, if a problem arises concerning any agency, the uniform nature of the act would allow a clarification to be made efficiently for all agencies that faced the same problem.

Although Chief Justice Fatzer during his tenure on the Kansas Supreme Court repeatedly called for the legislature to adopt a procedure act,\textsuperscript{103} no legislation was

\textsuperscript{98} Id. art. 69-9-2(d).
\textsuperscript{103} See, e.g., Yellow Freight Sys., Inc. v. KCCR, 214 Kan. 120, 126, 519 P.2d 1092, 1097 (1974);
produced. If the legislature does not act, the burden to protect parties from the vagaries of the present statutes will fall on the Kansas Supreme Court.

2. Judicial Reform

The Kansas court could eliminate some of the variations in Kansas procedures by holding as a matter of state due process that the Kansas Constitution requires certain procedural protections to revoke an entitlement. The court could also act by requiring certain common procedures for similar agencies as a matter of statutory interpretation.

a. State Due Process

If the Kansas court is to hold that the Kansas Constitution requires that certain procedural protections be observed to revoke an entitlement, it may have to overlook the recent decisions of the United States Supreme Court interpreting the federal due process clause. The United States Supreme Court has restricted the use of the federal due process clause for reasons that may not be applicable to the state supreme court. Moreover, the logic of those decisions may be flawed in such a manner that the state would not wish to follow them.

The United States Supreme Court apparently was motivated to restrict the use of the due process clause by considerations of federalism. The Court wanted to allow the states to determine their own administrative procedures free from federal judicial interference. This purpose, however, would have no relevance for the state supreme court. The Court has also been impelled by a desire to respect those legislative judgments concerning procedure that strike a balance between the advantages and disadvantages of providing additional trial-like protections. These judgments, representing the popular will, should not be lightly overturned by the judiciary. But the Supreme Court has not stopped at merely showing deference to these legislative compromises. It has gone further and almost entirely abandoned any independent judgment concerning the fairness of the legislative decisions. This last step stands the due process clause on its head. Although the due process clause was intended to be a constraint on legislative actions, the legislature, in


It might also be possible to limit the effect of the recent Supreme Court decisions by reading those cases to apply only to entitlements of public employment—the subject matter of those cases. See notes 13-27 and accompanying text supra. So far a majority of the Supreme Court has not extended the restrictive analysis of those decisions to other entitlements such as education, see Goss v. Lopez, 419 U.S. 565 (1975), or welfare, see Mathews v. Eldridge, 424 U.S. 319 (1976). A reason may exist for continuing this difference of treatment. Respect for federalism may be most important concerning state personnel policies, which are solely administered by the states, and less important concerning other types of entitlements such as education and welfare, the responsibility for which is coordinated between federal and state governments. In fact, the ability to hire and fire employees may be one of the important attributes of the sovereignty of a state government. Cf. National League of Cities v. Usery, 426 U.S. 833, 844-46 (1976) (power to determine terms of employment as attribute of state sovereignty). As a consequence, while the degree of federal court interference might be equally great regarding employment, education or welfare cases, the state might deserve the greatest autonomy with respect to its personnel policies. If read in this manner, the recent Supreme Court cases do not extend beyond cases of government employment and the Roth analysis would still prevail for other entitlements.


See Arnett v. Kennedy, 416 U.S. at 154.

See notes 13-27 and accompanying text supra.

Monaghan, supra note 3, at 405.
effect, has been made the judge of what constitutes due process. Under such a scheme, for purposes of administrative procedure, the due process clause is rendered a nullity.

By exercising its independent judgment, the Kansas Supreme Court can avoid the undesirable direction of federal developments.\textsuperscript{109} As a matter of interpretation of the state's due process clause,\textsuperscript{110} the state court could recognize the rationale of Roth as controlling and hold that all entitlements are deserving of protection.\textsuperscript{111} The court can then proceed to balance the state's interest in proceeding informally against a litigant's interest in additional protections.\textsuperscript{112} If the legislature has struck a responsible balance between those competing interests, it should be respected. If not, the court should exercise its constitutional responsibility and find the statute violative of the state's due process clause.

The nature of this approach may be illustrated by applying it to Adams v. Marshall.\textsuperscript{113} In that Kansas case the procedural protections accorded a dismissed policeman were extended pursuant to a city ordinance that required an informal pre-termination hearing and permitted dismissal only for such cause as would promote the efficiency of the service.\textsuperscript{114} The Kansas Supreme Court assumed that the due process clause applied to the city's termination of the policeman and reversed the decision because the city had failed to hold an open hearing or to offer the policeman the right to cross-examine adverse witnesses.\textsuperscript{115} Since the city ordinance that created the policeman's entitlement also indicated the procedures to be used to make a "good cause" determination,\textsuperscript{116} the situation appears identical to that present in Arnett.\textsuperscript{117} However, by applying the Roth balancing test rather than taking the approach adopted by the Arnett Court, the Kansas court would not necessarily limit the procedures to those provided in the ordinance. Since the policeman had an entitlement, the court would balance the city's interest in a closed hearing with no cross-examination against the employee's interest in an open hearing with cross-examination. In this manner, the Kansas court could decide that additional protections were required.

\textit{b. Statutory Interpretation}

The Kansas court could also attempt to resolve the problems of ambiguity as a matter of statutory interpretation, giving ambiguous language an interpretation consistent with the procedural protections offered by similar statutes. For example, some statutes provide that a party can present both documentary and testimonial evidence, but other statutes specify only that a party can present "evidence."\textsuperscript{118} Absent an apparent justification for treating the two types of statutes differently, the court could conclude that the legislature intended the word "evidence" to include both types of presentations.

\textsuperscript{110} See notes 5-6 and accompanying text supra.
\textsuperscript{111} See notes 7-9 and accompanying text supra.
\textsuperscript{113} Id. at 597-98, 512 P.2d at 368-69.
\textsuperscript{114} Id. at 603-05, 512 P.2d at 373-74.
\textsuperscript{115} Id. at 598, 512 P.2d at 369.
\textsuperscript{116} See notes 13-18 and accompanying text supra.
\textsuperscript{117} See note 74 supra.
\textsuperscript{118} See note 74 supra.
Unfortunately, the problem of inconsistency is less amenable to solution by this approach. If statutes clearly and specifically offer different combinations of procedural protections, it is difficult to discern a legislative intention to offer the same types of protections. Nevertheless, if there is no apparent justification for the differences, the court might conclude that the various disparities were unintentional. For example, among the state's professional licensing agencies, only five of the eight agencies are required by statute to provide the right to cross-examine adverse witnesses. Unless an agency could suggest a justification for this difference in treatment, the court could conclude that the legislature intended to offer the right of cross-examination to all parties involved in professional licensing. In this circumstance, the court would not consider the silence of the legislature to be an indication that cross-examination should not be provided.

c. Evaluation of Reform Efforts

Legislative reform by enactment of a procedure act is preferable to judicial action. The legislature clearly is in a better position to weigh the policy questions involved in determining the appropriate procedures to be used. It can hold the necessary hearings and consider a broad spectrum of public opinion. Moreover, judicial reform efforts face certain limitations. Any decisions based on the state due process clause that hold that, as a minimum, certain procedural protections must be provided would be binding on the legislature. By comparison, if the court were to proceed by use of statutory interpretation, the legislature could correct the court if it misinterprets the intention of that body. Statutory interpretation, however, may have limited application in solving problems of inconsistency. As a result, unless the court were to use the state's due process clause in the manner described, these problems could remain unresolved. However, despite the disadvantages of judicial action, if the legislature refuses to act, the present state of affairs should not be allowed to continue. The court can and should act.

Reform of the state's administrative procedure system, however, cannot end with revision of the provisions concerning hearing procedures. The manner in which judicial review is conducted is also flawed. This Article will consider next the nature of these flaws and possible remedies.

II. Judicial Review

Any rationalization of Kansas administrative procedure will require the following changes in present theories concerning judicial review. First, a reviewing court should be prevented from hearing evidence that has not been presented to an agency. Second, the courts should not refuse the legislative order to engage in de novo review when an agency is clearly engaged in an adjudicative function. Last, if the applicable statutes have left the scope of review to the discretion of the courts, they should decline to engage in de novo review whenever the expertise of the agency is important to an agency's resolution of a controversy. The following discussion addresses these proposals.

A. Availability and Scope of Review

The enabling legislation of many agencies authorizes judicial review, usually

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See note 87 supra.
in a district court. For enabling acts that contain no such provision, the legislature has provided for review in another manner. If the actions of the agency can be considered to be “judicial or quasi-judicial” in nature, judicial review may be obtained pursuant to section 60-2101(d). If agency actions constitute the adoption of a “rule [or] regulation,” review may be obtainable pursuant to section 77-434. Unless it is clear that the legislature intended to leave the matter completely to the discretion of the agency, review may be obtained pursuant to the district court’s equitable jurisdiction in instances in which agency action does not fall within this network of statutory provisions.

When the legislature has provided for judicial review, the statutory enactment can also mandate the scope of review or the extent to which the reviewing court is bound to accept an agency’s factual or legal conclusions. In some situations, described as de novo review, a court will be ordered to decide a legal or factual issue as if the agency had not previously made a decision. In a de novo review the court may be limited by statute to considering only the facts in the administrative record or it may be allowed to take its own evidence. In other situations, review will be “limited” because the statute will order the reviewing court to accept the factual determinations of the agency if they are supported by “substantial evidence” and the ultimate determinations (the application of the statute to the facts found) if they are “reasonable” or not “arbitrary and capricious.” If a

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11 See, e.g., id. §§ 75-2929, 2929e (Supp. 1979) (Civil Service Act); id. § 75-3306 (1977) (Social and Rehabilitative Services Act).
14 208 Kan. 658, 661, 493 P.2d 1259, 1262 (1972); Gray v. Jenkins, 183 Kan. 251, 326 P.2d 319 (1958). But see Bush v. City of Wichita, 223 Kan. 651, 659-60, 576 P.2d 1071, 1077-78 (1978). When the court held that the legislature had not provided for judicial review of the Civil Rights Commission’s “probable cause” decisions, by which the agency decides not to proceed, the court did not use its equitable powers to take jurisdiction. The court noted that the “[d]etermination to proceed [with a complaint] is an executive function” and that “investigation is traditionally a function of state law enforcement officers, not the courts.” Id. at 659, 576 P.2d at 1077. Accord Van Scoyk v. St. Mary’s Assumption Parochial School, 224 Kan. 304, 580 P.2d 1315 (1978). These expressions may indicate the court will not take equitable jurisdiction where the legislature apparently intends a matter to be left to the complete discretion of an agency.
16 See, e.g., id. § 44-556 (Supp. 1979) (Workmen’s Compensation Act).
17 Notes 132-39 and accompanying text infra.
18 See, e.g., Kan. Stat. Ann. § 75-4334(b) (1977), which reads in part: “Findings of the [Public Employee’s Relations Board] shall be conclusive unless [they] were not supported by substantial evidence and the record considered as a whole.”

The legislature has sometimes indicated its intentions to order limited review by the use of some other phrase, but the phrases have been equated with “substantial evidence.” See, e.g., Strader v. Public Employees Retirement Sys., 206 Kan. 392, 396-97, 479 P.2d 860, 865-66 (1971) (interpreting § 74-4909 (10) (Supp. 1979)) (holding that “[G]ross mistake of fact . . . equivalent to fraud” means the existence of “substantial competent evidence to support the findings of the Board”); Farmland Foods, Inc. v. Abendroth, 225 Kan. 742, 745, 594 P.2d 184, 187 (1979) (interpreting § 44-709(f)(5) (Supp. 1979)) (holding that “if supported by evidence” means the existence of “substantial evidence”).

A court will also use a limited scope of review if it entertains review under its equitable jurisdiction. Southeast Kan. Landowner’s Ass’n v. Kansas Turnpike Auth., 224 Kan. 357, 368, 582 P.2d 1123, 1132
statute provides for a limited scope of review for factual determinations, the court will read the statute as also limiting the scope of review concerning the ultimate determinations. Limited review, however, apparently does not apply to purely legal issues such as the determination of jurisdiction in which the facts are undisputed and the issue presented is only a question of statutory construction.

The inadequacy of present theories of review can be assessed against this background. In the application of both limited and de novo review statutes, the Kansas Supreme Court has not carried out the will of the legislature.

B. Limited Scope of Review

When the legislature orders limited review, it presumably intends that an agency be given considerable deference in its choice of how to proceed. However, the Kansas Supreme Court in Northern Natural Gas Co. v. Dwyer improperly reduced agency autonomy by holding that when a district court undertakes limited review, it may use additional relevant evidence to assist in that function. The district court heard what the plaintiff described as "newly discovered evidence," but ultimately decided the case on the record presented to the agency. The supreme court held that since the rules of civil procedure authorized a district court to hear all relevant evidence in any of its proceedings, it could accept evidence that had not been presented to the agency.

In Olathe Hospital Foundation, Inc. v. Extendicare, Inc. the court reacted to the possibility that under its holding in Dwyer a litigant could withhold some of its evidence until the time of judicial appeal. The court reiterated its position that the district court was free to admit relevant evidence not presented to the agency, but it added the qualification that a party could not "produce [the] evidence piecemeal." In other words, the party could not "produce part of [the] evidence before an administrative agency and then produce the balance on judicial review." If the court really meant that a party must present its entire case to an agency, there would be no need for the district court to admit any evidence unless the agency

(1978) (quoting Warburton v. Warkentin, 185 Kan. 468, 479, 345 P.2d 992, 1000-01 (1959)). The reason is that constitutionally only "judicial" or "quasi-judicial" agency decisions can receive de novo treatment. See notes 140-46 and accompanying text infra. Since agency action that is "judicial" or "quasi-judicial" can be reviewed pursuant to statute, judicial review under a court's equitable powers concerns only cases which constitutionally could not qualify for anything but limited review.

See, e.g., Kansas Ass'n of Pub. Employees v. Public Employees Local 1132, 218 Kan. 509, 510, 544 P.2d 1389, 1392-93 (1976), in which the action of the state's Public Employees Relations Board was challenged. The applicable statute describing scope of review said only that the Board's factual conclusions were to be "conclusive" unless they were not "supported by substantial evidence and the record considered as a whole," Kan. Stat. Ann. § 75-4334(b) (1977). The court read the statute as "an unequivocal statement that in reviewing the action of the . . . Board the courts shall apply the customary standards for the review of . . . an administrative agency," including whether "the tribunal acted fraudulently, arbitrarily or capriciously," whether the order was "substantially supported by evidence," and whether the agency action "was within the scope of its authority." 218 Kan. at 511, 544 P.2d at 1392.

120 Id. at 341, 492 P.2d at 152-53.
121 Id. at 345, 492 P.2d at 155. The court's bolding was consistent with its opinions in two earlier zoning cases. See Keeney v. City of Overland Park, 203 Kan. 389, 394, 454 P.2d 456, 460 (1969); Bodine v. City of Overland Park, 198 Kan. 371, 386, 424 P.2d 513, 525 (1967).
had failed to make a record of its deliberations. The supreme court, however, has explicitly refused to limit its holding to the no-record situation. If the court meant, instead, that a party does not need to present all of its evidence to the agency, it did not state clearly what type of evidence need not be presented. Presumably, the court meant only that "newly discovered" evidence may be admitted by the district court.

Even under this more restrictive interpretation, Dwyer is unsatisfactory. Since it may be difficult at times to determine whether evidence is actually "newly discovered," litigants may be able to hold back any type of information and present it later to the district court. However, if the district court would remand a case to an agency to consider any newly discovered evidence, a litigant would never have an incentive to reserve evidence for presentation to the district court. If the matter were remanded to the agency to consider the new evidence, it might be resolved to the satisfaction of the litigant and no appeal would be taken. In that circumstance, judicial resources would have been conserved. Even if the litigant decided to appeal, a district court would have the benefit of the agency's expert opinion concerning the effect of the new evidence.

The court has failed properly to execute the will of the legislature in an even more important matter: in instances in which the legislature has ordered it to use de novo review, the court has often refused on the ground that de novo review violates the separation of powers doctrine. As the following discussion makes clear, the court has taken that position when there would have been no violation of the doctrine.

C. "De Novo" Review

1. The Separation of Powers Doctrine

Administrative agencies are often authorized to perform two functions that otherwise could be undertaken by the legislature itself. If an agency promulgates rules, usually denoted as rulemaking, the actions have the same legal effect as legislative enactments. An agency can also act in the same manner and with the same effect as the legislature when it makes decisions concerning the budgets of departments and programs, such as the decision to close a school, to end a traffic safety program,

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See 208 Kan. at 341, 492 P.2d at 152.

When the legislature has wanted a district court to take evidence, it has specifically indicated that desire. See, e.g., Kan. Stat. Ann. § 41-323 (1977). Normally, however, this result apparently is not intended. For example, in the previous version of § 65-504 (Supp. 1979), any applicant for a license to operate a children's day care center could have appealed a denial or revocation to the district court. The statute had provided that the measure of the scope of review was to be "arbitrary or unreasonable," but that the district court could take new evidence. See Rydd v. State Bd. of Health, 202 Kan. 721, 725, 732, 451 P.2d 239, 243, 248 (1969). In amending that section, the legislature kept the same limited scope of review, but deleted the reference that allowed the district court to receive new evidence. Kan. Stat. Ann. § 65-504 (Supp. 1979). In light of the Rydd case, which interpreted the previous section to allow this practice, the deletion should be read as disapproval of the practice and as an endorsement of the concept of exhaustion.

K. Davis, Administrative Law Text § 5.01, at 123 (3d ed. 1972) ("[R]ulemaking is the part of the administrative process that resembles a legislature's enactment of a statute."); cf. 5 U.S.C. § 551(4) (1976) (Administrative Procedure Act) ("[R]ule means . . . an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.").
or to acquire land for a new building.\footnote{See Boehm v. Board of County Comm'rs, 194 Kan. 662, 664, 400 P.2d 739, 741 (1965) (acquisition of land for public building); Limens v. Board of Educ., U.S.D. No. 408, 3 Kan. App. 2d 662, 664-65, 600 P.2d 152, 154-55 (1979) (decision to close school building); Gonser v. Board of County Comm'rs, 1 Kan. App. 2d 57, 63, 562 P.2d 102, 107-08 (1977) (funding ended for traffic safety program).} Both rulemaking and budget decisions normally involve considerations that will affect future events based on an interpretation of desirable public policy. As a result, these functions are usually described as "administrative." Agencies may also undertake functions that could have been entrusted to the judiciary. These are accomplished by a trial-like proceeding, commonly called adjudication. Adjudication, like a judicial trial, involves the application of a legal standard (already established by the legislature or by rulemaking) to a set of facts to determine whether and to what extent some past event falls within the enactment.\footnote{See K. Davis, supra note 140, § 5.01, at 124.}

While not all agency actions fit neatly into the administrative or adjudicatory categories,\footnote{See Masson v. County Assessor, 222 Kan. 581, 585, 567 P.2d 839, 842 (1977) (evaluation of purpose of property for tax assessment); Board of County Comm'rs v. Brooker, 198 Kan. 70, 73-74, 422 P.2d 906, 911 (1967) (order of Board of Tax Appeals).} these categories will suffice to explain the constitutional problem associated with judicial review. Under the separation of powers doctrine, Kansas courts cannot use de novo review for agency actions that are analogous to legislative functions.\footnote{See Gawith v. Gage's Plumbing & Heating Co., 206 Kan. 169, 174, 476 P.2d 966, 970 (1970) (holding that "The Kansas Supreme Court has almost universally applied this doctrine of separation of powers to various appeal statutes providing for appeals from purely administrative tribunals, ruling that the court may not substitute its judgment on questions of fact for that of an administrative tribunal").} Otherwise, by substituting its judgment for that of the agency, the judiciary would, in effect, be enacting legislation of its own, and would, thereby, violate the state constitutional requirement that no branch of government may engage in the function of another.\footnote{Kansas State Bd. of Healing Arts v. Foose, 208 Kan. 447, 450, 436 P.2d 828, 831 (1968); Lira v. Billings, 196 Kan. 726, 729, 414 P.2d 13, 16-17 (1966). Limited review, which only sets outside limits on any agency's discretion, is considered to be a legal issue properly assignable to the judiciary. See Stephens v. Unified School Dist. No. 500, 218 Kan. 220, 231, 546 P.2d 197, 206-07 (1975).} De novo review of agency adjudication, by comparison, poses no similar problem since it would involve the reviewing court in the function ordinarily performed by appellate courts as part of their constitutional responsibility.\footnote{See id. at 730-31, 414 P.2d at 17.}

2. Distinguishing Administrative from Adjudicatory Functions

While the basic theory of the separation of powers doctrine cannot be faulted, the application of that doctrine has left the field of scope of review in disarray. In particular, because the Kansas Supreme Court has failed to follow its own test to determine whether an agency action is adjudication, it has concluded that a limited scope of review is constitutionally necessary in far more instances than the doctrine, properly interpreted, would require. The nature of the problem can be seen in Brinson v. School District No. 431,\footnote{223 Kan. 465, 576 P.2d 602 (1978). The district court heard the case under authority of § 60-2101(a), which was the forerunner of § 60-2101(d) (Supp. 1979), the present governing statute. 223 Kan. at 466, 576 P.2d at 604.} in which a public school teacher claimed that her dismissal by the local school board violated a state statute that entitled teachers to continuous employment unless "good cause" existed for dismissal. The district
court heard the teacher's appeal under a jurisdictional statute allowing appeal for "judicial or quasi-judicial" agency actions. Since that section applies only to adjudication, the judiciary should be free, as a constitutional matter, to apply de novo review. By definition, for a court to obtain jurisdiction under the section, the matter cannot be legislative in nature. In those circumstances, no separation of powers problem should ever be presented.

The Kansas Supreme Court, however, reached the opposite conclusion. The court held that the district court erroneously interpreted the jurisdictional review statute as providing for de novo review when, instead, it could only provide for limited review. The court believed that its construction of the statute was correct because otherwise the statute would violate the separation of powers doctrine, and "licensing is a purely administrative function, not quasi-judicial . . . ." In reaching this result, the court was implicitly affirming what it had elsewhere explicitly declared: that agency licensing decisions are "administrative in character" even when the agencies are "performing functions sufficiently 'quasi-judicial' as to make their orders appealable under [the jurisdictional statute]." The notion that agency action can be both legislative and judicial at the same time, however, is inconsistent with the court's own criteria for distinguishing the two types of situations.

In *Gawith v. Gage's Plumbing and Heating, Inc.*, in which the company appealed the decision of the Director of Workmen's Compensation to award Gawith damages for an accident he suffered during the course of his employment, the court proposed three tests to aid in classifying an agency's functions. One test was whether the court was required to make the decision normally made by the administrative agency in the first place. The court failed to use or explain this test. Since the judiciary could be charged with deciding the issue if it involved a case and controversy and if it did not cause the court to engage in legislative type functions that would violate the separation of powers doctrine, the court did not clarify the issue by framing the separation of powers question as part of its test. After all, the separation of powers question is the one in need of resolution. If the court meant only that the matter must involve a case or controversy, the test is useless as a method to resolve the separation of powers controversy.

The second test was whether the courts historically have performed the function to be performed by the administrative body. The test, of course, assumes that the prior exercise of jurisdiction was constitutionally correct. If that assumption is valid, this test is more helpful. The second test was dispositive of the *Gawith* case.

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148 223 Kan. at 470, 576 P.2d at 606. The statute under interpretation, § 60-2101(a) (Supp. 1974), ambiguously provided "When an action is filed in the district court on appeal or removal from an inferior court . . . the district court may . . . permit the issues to be enlarged in the same manner and to the same extent as if the action had been originally commenced in the district court." The statute has been amended to eliminate the confusion. See id. § 60-2101(d) (Supp. 1979).
149 223 Kan. at 468-69, 576 P.2d at 605-06.
150 223 Kan. at 469, 576 P.2d at 606. Apparently, the court analogized the entitlement of public employment to the entitlement of licensure.
151 218 Kan. at 223, 546 P.2d at 207-08.
153 206 Kan. at 178, 476 P.2d at 973. Id. Id.
because the Kansas judiciary had decided the issue of eligibility for workmen’s compensation awards before creation of the workmen’s compensation agency.\textsuperscript{156}

The test, however, cannot be applied as it was in \textit{Copeland v. Board of Optometry},\textsuperscript{157} in which the plaintiff challenged the revocation of his license. In deciding that optometry licensing constituted an administrative function, the court noted that the actions of the optometry board could not be considered quasi-judicial unless the judiciary had historically been assigned those functions.\textsuperscript{158} A failure by the courts to license optometrists, however, does not necessarily mean that the required determinations are not adjudicative. It may mean that the legislature, as a matter of policy, has always chosen to give the function to an agency.

The third test cited by the court was that suggested by Justice Holmes in \textit{Prentice v. Atlantic Coast Line Co.},\textsuperscript{159} a “judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.” By comparison, according to Holmes, “[l]egislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.”\textsuperscript{160} In a later case, \textit{Thompson v. Amis}, involving the dismissal of a state employee by the chairman of the state Civil Service Board, the court rephrased this test by noting that “[i]t may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature.”\textsuperscript{161}

In most instances, this “functions” test will easily dispose of the issue.\textsuperscript{162} The actions of the workmen’s compensation director, for example, were clearly analogous to judicial actions since “the director investigates, declares and enforces liabilities as they stand on past facts (the injury of a workman while engaged in the course of his employment) under \textit{existing laws} (the workmen’s compensation act).”\textsuperscript{163} Similarly, the school board in \textit{Brinson} declared and enforced liabilities as they stood on past facts (whether there was mutual consent to a termination) under laws already in existence (the continuing contract law). It is difficult to see how

\textsuperscript{156} \textit{Id.} at 179, 476 P.2d at 973.


\textsuperscript{158} \textit{Id.} at 743, 518 P.2d at 380.

\textsuperscript{159} 211 U.S. 210, 226 (1908).

\textsuperscript{160} 206 Kan. at 178, 476 P.2d at 973 (quoting 211 U.S. at 226).

\textsuperscript{161} 208 Kan. 658, 663, 493 P.2d 1259, 1263 (1972).

\textsuperscript{162} The test is less helpful if a proceeding appears to have some of the attributes of both branches. See K. Davis, \textit{supra} note 140, § 5.01 at 124. For example, rules normally are designed to apply to unnamed persons, but can at times apply only to one individual, thereby giving the rule a superficial resemblance to adjudication. This resemblance may have misled the Kansas Supreme Court in \textit{Golden v. City of Overland Park}, 224 Kan. 591, 584 P.2d 130 (1978), in which the court declared, contrary to its prior cases, that zoning amendments which apply only to one tract of land involve a quasi-judicial determination. Compare 224 Kan. 591, 597, 584 P.2d 130, 135 (1978) \textit{with} Union Quarries v. Board of County Comm’rs, 206 Kan. 268, 273, 478 P.2d 181, 185 (1970). The court thought it found in \textit{Golden} some of the attributes of a judicial hearing since “[w]hile policy is involved, such a proceeding requires a weighing of the evidence, a balancing of the equities, an application of the rules, regulations and ordinances to the facts,” 224 Kan. at 597, 584 P.2d at 135. The court erred by losing sight of the purpose of the \textit{Gauith} test, which is to allow an analogy to be drawn to either legislative or judicial activity. Although the zoning board would consider the facts of the existing situation, including the application of present rules to the one piece of land affected, it would do so only to determine whether to continue a present rule or adopt a new one. The board’s function is more analogous to legislative activity since, unlike the courts, which must accept or interpret rules as they are enacted, the zoning board is considering whether to actually replace the old rule.

\textsuperscript{163} 206 Kan. at 180, 476 P.2d at 974 (emphasis added).
the court thought the board engaged in the legislative action of making a new rule not already in existence.\textsuperscript{164} The court in \textit{Brinson} may have ignored the result required by the application of the \textit{Gawith} functions test because it had held in previous decisions that the business of licensing was an administrative function.\textsuperscript{165} However, one of these prior decisions, \textit{Lira v. Billings},\textsuperscript{166} reached the opposite conclusion; the court there determined that de novo review of the revocation of a license to drive because of the refusal to submit to a sobriety test did not violate the separation of powers clause. Three other decisions\textsuperscript{167} held that the licensing schemes at issue were administrative in character, but gave no explanation for the holdings except to cite two other cases. The other cases, \textit{Brinkley v. Hassig}\textsuperscript{168} and \textit{Meffert v. Board of Medical Registration and Examination},\textsuperscript{169} held that the procedural protections normally used in a civil trial did not have to be provided before a medical license could be revoked because licensing was an “administrative” function. Regardless of whether those decisions were correct at the time as a constitutional matter, they have no bearing on the separation of powers issue.\textsuperscript{170} Even if an agency may act, as a matter of due process, without affording all of the procedural protections found in a judicial trial, the agency still may be acting in a quasi-judicial manner. As long as the agency is weighing evidence and drawing conclusions under a preexisting statutory standard, it is acting in a sufficiently judicial manner that there is little or no danger that the agency’s actions will involve a legislative function.

Remarkably, other recent supreme court cases have recognized licensing as a quasi-judicial function, but without admitting that these earlier decisions were in error. In \textit{Schultze v. Board of Education District No. 258},\textsuperscript{171} the court applied the \textit{Gawith} criteria to hold “the [school] board functioned in a quasi-judicial manner when it administered a reprimand to its employee . . . .”\textsuperscript{172} Prior case law was not analyzed. In \textit{Suburban Medical Center v. Olathe Community Hospital},\textsuperscript{173} the decision by the state health planning agency to license the construction of new hospital facilities was found to be “quasi-judicial” because it was “very clear that the proceedings . . . were not to set or fix criteria for use in determining the granting or denial of the application . . . [but] were to determine whether a particular applica-
tion met predetermined criteria."\textsuperscript{174} The court considered only one prior case, \textit{Olathe Hospital Foundation, Inc. v. Extendicare, Inc.}\textsuperscript{175} This case held that such functions were administrative and not quasi-judicial.\textsuperscript{176} The case was distinguished in \textit{Suburban Medical Center} on the ground that after it was decided, the legislature had mandated "a detailed formal [hearing] procedure" to be followed by the health agency in a licensing decision.\textsuperscript{177} The court's rationale for distinguishing \textit{Olathe} is misleading. By the court's own tests, the kinds of procedures followed are not relevant to whether a matter is quasi-judicial. The court has always asked, instead, whether the agency is applying previously established rules to a particular fact situation.\textsuperscript{178} This function remains quasi-judicial whether the agency conducts a full trial or adopts less formal procedural protections.

3. \textbf{A New Approach}

As a result of its application of the \textit{Gawith} functions test, the Kansas Supreme Court has created a legacy of confusion. In some instances the court has found a matter to be administrative when the functions test clearly indicates it is quasi-judicial. At other times, the functions test has been correctly applied. The explanation for this difference in treatment may be that the court's desire, as a policy matter, to apply limited review prompted it to improperly find certain actions to be administrative. In those decisions,\textsuperscript{179} the court apparently thought that the judiciary should avoid second-guessing the expert opinion of the agency professionals and should inquire no further than required by a limited scope of review. Some opinions, such as \textit{Kansas State Board of Healing Arts v. Foote},\textsuperscript{180} illustrate this disinclination on the part of the court. In \textit{Foote} the court noted that "a wider scope of review such as a \textit{de novo} determination, would amount to virtual disregard of the specialized nature of the board."\textsuperscript{181} In other cases, in which \textit{de novo} review was allowed, the court has emphasized that the factual question at issue was of a type that a judge or jury could easily resolve without any special expertise.\textsuperscript{182}

In some decisions,\textsuperscript{183} the court's misapplication of the functions test has yielded the same result sought by the legislature. The court's method of proceeding, however, lacks doctrinal clarity. \textit{Lauber v. Firemen's Relief Association}\textsuperscript{184} illustrates the court's faulty approach. The association was authorized to distribute funds held in trust for the "relief" of any firemen "injured or physically disabled in or by reason of the discharge of his or her duties."\textsuperscript{185} Except for the language just quoted, the legislature had provided no indication of the nature or extent of the

\textsuperscript{174} Id. at 530, 597 P.2d at 662. The court needed to categorize the action as legislative or quasi-judicial to determine whether \textit{ex parte} contacts were permissible. \textit{Id}. at 329, 597 P.2d at 661.
\textsuperscript{175} 217 Kan. 546, 559 P.2d 1 (1975).
\textsuperscript{176} \textit{Id}. at 552-53, 559 P.2d at 8.
\textsuperscript{177} 226 Kan. at 329, 597 P.2d at 661.
\textsuperscript{178} \textit{See id.}
\textsuperscript{179} \textit{See notes 167-69 and accompanying text supra.}
\textsuperscript{180} 200 Kan. 447, 436 P.2d 828 (1968).
\textsuperscript{181} \textit{Id}. at 450-51, 456 P.2d at 831-32.
\textsuperscript{182} \textit{See, e.g.,} \textit{Lira v. Büllings}, 196 Kan. 726, 730-31, 414 P.2d 13, 17 (1966) (observing that "[C]ourts and juries cannot be said to be lacking in qualification or expertise to make such determination as is here involved").
\textsuperscript{183} \textit{See, e.g.,} notes 162-67 and accompanying text supra.
\textsuperscript{185} \textbf{KAN. STAT. ANN. § 40-1707 (1964).}
relief to be provided. Consequently, the court concluded that because the legislature must have intended to leave eligibility to the “discretion” of the agency, the matter was “administrative” and not suitable for de novo review. The court reached the correct result, but its reasoning was flawed. Pension boards are engaged in the adjudicatory function of determining how the facts presented to them fit within the already existing statutory standards. It is true that this particular statute is so vague that any adjudication will have the effect of further developing those standards by its precedential value. Nevertheless, many judicial decisions have that effect without being administrative in nature. The court should have decided that by the very construction of the statute the legislature had ordered it to undertake only limited review.

In other decisions, by misapplying the functions test, the court has impermissibly ignored the will of the legislature. When the legislature orders it to undertake de novo review, despite its lack of expertise, the court should accept the dictate of the directly elected branch of government. Whatever the court’s own view concerning its ability to handle the issue, the legislature has deemed any deficiency on the part of the court to be unimportant or outweighed by other factors.

In those cases in which the legislature has been silent concerning the scope of review, the court is free to exercise any preference for limited review. That preference should not, however, be based on the doctrine of separation of powers. If the court believes the agency should be given deference because of its expertise, the court should announce that policy as the reason for its decision rather than concluding that the agency is engaged in an administrative function.

4. Significance of a Procedure Act

By revising its approach concerning the separation of powers doctrine, the court is more likely to carry out a legislative command that de novo review be used. The legislature has not acted consistently, however, in ordering that type of review. For example, with respect to eight of the state’s professional licensing boards, only seven of the enabling acts make a provision for judicial review. Of these

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187 Id. at 577-78, 451 P.2d at 498-99.
188 Nowhere has the legislature ... indicated what should be paid to firemen who are injured ... [By comparison] under the workmen’s compensation act ... compensation to be awarded ... is spelled out in some detail. ... [Thus] [w]e construe “relief” as used by the legislature in 40-1707 to mean [that] [w]ithin reasonable limits ... [the determination of] the amount of financial assistance to be paid ... falls within the discretionary power of the Firemen’s Relief Association to administer the fund.
190 The amount of money in the fund could vary greatly depending on past pay-outs and the number of property insurance policies in effect in the jurisdiction. The size of the fund was based on the latter consideration. In such a scheme, the legislature obviously intended to delegate considerable discretion to the managers of the fund to make particular distributions. By comparison, the Workmen’s Compensation Act provides clear and detailed statutory criteria to be used in eligibility decisions. See 202 Kan. at 575-78, 451 P.2d at 496-99.
191 See notes 162-70 and accompanying text supra.
192 See, e.g., KAN. STAT. ANN. § 60-2101(d) (Supp. 1979).
193 See note 85 supra.
194 KAN. STAT. ANN. § 1-314 (1975) (accountants); id. § 7-124b (Supp. 1979) (Rule 212) (attorneys); id. § 65-1121(b) (Supp. 1979) (nurses); id. § 65-1458 (1972) (dentists and dental hygienists); id. §§ 1626-1628b (Supp. 1979) (pharmacists); id. § 65-2848 (Supp. 1979) (physicians); id. § 74-7028.
seven statutes, two are silent concerning the scope of review to be used, three order limited review, and the other two order de novo review. Nine of the state's health related agencies present a similar picture. Only six of the nine relevant enabling acts make a provision for judicial review. Of those six, two are silent concerning the scope of review, three order de novo review, and the other one orders limited review.

These differences have no apparent justification. The legislature could have ordered limited review for some agencies on the ground that they possessed a technical expertise not shared by the judiciary, yet some agencies apparently possessing the same type of expertise undergo de novo review. Under that standard, since the judiciary is free to substitute its own judgment for that of the agency, the legislature has paid no deference to the expertise of the agency. In other instances, the legislature has left the determination of the scope of review to the courts, a course that suggests a lack of legislative interest concerning agency expertise. The mixed signals sent by the legislature to the courts suggest that to effectively reform the present system of judicial review, legislative reform is as necessary as judicial reform. The public will not benefit by greater judicial adherence to legislative directives concerning scope of review if such orders are unjustifiably inconsistent. An administrative procedure act would have the advantage of creating a consistent approach now apparently lacking. Agencies performing similar functions would be given the same scope of review unless a justification existed for a different approach. If all Kansas agencies were subject to review on such a basis, the present difficulties should be eliminated.

III. Conclusion

Kansas now has an opportunity to rethink its administrative procedures. At a time when an increasing number of citizens are affected by state regulation, the legislature and the courts have an obligation to undertake this effort.

Reform of the state's administrative law should begin with the adoption of an administrative procedure act. Recent decisions of the United States Supreme Court concerning the application of the due process clause to state agencies have had the effect of allowing the states substantial autonomy to decide what procedural protections will be provided before the revocation of an entitlement. Unfortunately, the countless different statutory sections in Kansas that apply to this situation are both ambiguous and inconsistent. Kansas should, therefore, join the forty-two other jurisdictions that have adopted administrative procedure acts. In a pro-

(Supp. 1979) (architects). But see id. § 65-1507 (Supp. 1979) (optometrists). In such circumstances, review is pursuant to id. § 60-2101(d) (Supp. 1979), which is silent concerning scope of review. See note 190 and accompanying text supra.

192 Id. § 7-124b (Supp. 1979) (Rule 212); id. § 65-1458 (1972).
193 Id. § 65-1121(b) (Supp. 1979); id. § 65-1128 (Supp. 1979); id. § 65-2848 (Supp. 1979).
194 Id. § 314 (1975); id. § 74-7028 (Supp. 1979).
195 See note 89 supra.
197 Id. § 36-509(b) (Supp. 1979) (review under § 60-2101(d) (Supp. 1979), which does not specify scope of review); id. § 65-438 (Supp. 1979).
198 Id. § 8-259 (1975); id. § 41-323 (1973); id. § 65-504 (Supp. 1979).
199 Id. § 65-1829 (1972).
200 See notes 100-01 supra.
procedure act, since the same provisions are applied to agencies engaged in similar functions, problems of inconsistency should be substantially eliminated. Moreover, the uniform nature of the act will allow greater scrutiny to avoid ambiguous provisions. The ability to amend the act will permit a uniform response to problems arising subsequent to the act. Efficient adaptation of that sort is not possible under the present confused scheme.

In the past, the legislature has not responded to requests by the Chief Justice of the Kansas Supreme Court that it adopt a procedure act. If the legislature does not do so in the future, the court itself should assume some responsibility to eliminate the potential unfairness inherent in the present statutory system. As a matter of *state* due process, the court should decline to adopt some of the recent decisions of the United States Supreme Court that were motivated by factors not applicable to state courts. If the court were to take this position, it would be able to weigh a party's interest in obtaining additional procedural protections against the state's interest in complying with only the procedures provided by statute or rule to revoke an entitlement. A decision supporting the party would have the effect of requiring, at a minimum, that the protections sought by the party must be provided to all similar litigants as a constitutional matter. The court could also interpret statutes to eliminate problems of ambiguity or inconsistency. Although statutory interpretation would have the advantage of not binding the legislature, it would not eliminate problems of inconsistency. Unless the legislature acts, the court may need to resort to the state due process clause to resolve the inconsistencies.

Reform of the state's administrative procedures should also include changes in judicial review. Rulings that allow a reviewing court to admit evidence that has not been presented to an agency should be revised. A remand to the agency to consider the evidence would preserve judicial resources and protect the autonomy of the agency. The court should also revise its use of the separation of powers doctrine. Pursuant to that doctrine, the court refuses to undertake *de novo* review of agency functions that are administrative rather than quasi-judicial. Because the court has often failed to follow its own test for distinguishing the two types of functions, however, it has frequently decided that quasi-judicial actions were administrative. In these cases, the court has refused incorrectly to apply *de novo* review.

By revising its approach concerning the separation of powers doctrine, the court is more likely to carry out a legislative command that *de novo* review be used. The legislature, however, has not acted consistently in determining scope of review. For agencies performing similar functions, the legislature has ordered *de novo* review for some, limited review for others, and has indicated no preference concerning scope of review for still others. A procedure act offers the advantage of creating a consistent approach for these agencies. Clearly, legislative and judicial reform are both necessary in this area.